THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal Case No: A595/14

DPP Reference: 9/2/5/-343/14

In the matter between:

CC **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: VELLDHUIZEN & ROGERS JJ

Heard: **22 MAY 2015**

Delivered: **27 MAY 2015**

JUDGMENT

ROGERS J (VELDHUIZEN concurring):

[1] The appellant was charged in the court quo on two counts of raping children. The first count alleged that during July 2013 the appellant raped [X], a three-year-old boy, by inserting his penis in the child's mouth. The second count alleged that during 2013 the appellant raped [Y], an eight-year-old girl, by inserting his finger in her vagina.

[2] The appellant, who was legally represented, pleaded guilty on both counts. His signed statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 admitted the following. (i) As to the first count: During 2013 he called X to the toilet and asked him to open his mouth so that he could insert his penis. Once he had done so, he told the child to suck his penis. X was the child of his sister-in-law. X's cousin happened to see the incident and reported it to his father who confronted the appellant. (ii) As to the second count: During 2013 he inserted his finger into Y's vagina while she was standing in front of him.

[3] The State accepted the plea and the appellant was convicted on both counts. The matter was adjourned to obtain a correctional supervision report in respect of the appellant and victim impact reports in respect of the children. These reports were handed in by agreement. The appellant testified in mitigation. The magistrate imposed two sentences of life imprisonment, finding that there were no substantial and compelling circumstances to depart from the minimum sentence prescribed by s 51(1) of the Criminal Law Amendment Act 105 of 1997.

[4] The appellant now appeals against the sentences, exercising his automatic right of appeal in terms of the proviso to s 309(1)(a) of the Criminal Procedure Act. Mr GW Fourie appears for the appellant and Ms Ajam for the State.

[5] The victim impact reports can be summarised thus. In X's case, he had been too young to understand what was happening to him. He had not become less playful since the incident and was observed to be very playful during the interview with the social worker. The literature nevertheless indicated that there might be a negative outcome, cognitively, mentally and in regard to his social development.

[6] In Y's case, she was functioning normally for her age. There were no signs of inappropriate sexual behaviour. During the interview she was observed to be anxious, tense and tearful when asked about the incident. She felt shame. There were indications of day-dreaming or loss of focus, which can be a symptom of Post Traumatic Stress Syndrome. Even small sounds sometimes frightened her. She avoided contact with males. She experienced headaches and stomach pain following the incident.

[7] There is no evidence that either child suffered physical injuries ancillary to the rapes.

[8] The appellant's circumstances can be gleaned from the correctional service report and the evidence he gave in mitigation. He was 41/42 at the time of the rapes. He was the oldest of his mother's four children (from different fathers). His father did not feature in his upbringing. His mother provided a loving home environment though they were poor. From as early as he could remember he was blind in his left eye. He was bullied at school which, he thought, had affected his scholastic performance. He only got as far as standard three.

[9] The appellant testified that from the age of about eight until 14 he was made to perform oral sex on a friend of his who was slightly older than him and who came from a wealthy family where the appellant often went to play. When he was about 13 or 14 this friend's brother-in-law anally raped him. The appellant kept all of this to himself until 2014.

[10] In October 2003 the appellant, who was then 31 years old, was sentenced to 10 years' imprisonment on two charges of indecent assault. The victims were girls aged four and five respectively. The one was a member of the family, the other a family friend. In each case he had inserted his finger into their vaginas. (In terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 this conduct now amounts to rape.)

[11] Shortly after his incarceration the appellant was assaulted by a fellow prisoner. This prisoner had forced the appellant to perform menial tasks for him. The

appellant grew weary of this. One day this prisoner and his associates told the appellant to hand over his toiletries and phone card. He refused and was assaulted. A dagga cigarette was inserted into his right eye. He was only taken to see an eye specialist two years later. The specialist gave him spectacles but after about five months the sight in his right eye began to deteriorate. By the time he was seen again at Groote Schuur Hospital it was too late; he had lost the sight in his right eye and was completely blind.

[12] The appellant was released on parole during November 2008. On an unspecified date he was recommitted to prison for violating his parole conditions by changing address without informing his parole officer. He was again released on parole during November 2010, the parole period expiring during April 2013.

[13] During May 2011 the appellant married his present wife, […]. The latter's sister, […], is the mother of the complainants in the present case. The appellant and his wife have a two-year-old son.

[14] The appellant's maternal aunt and sister reported to the social worker that he is generally passive in nature, non-violent, honest and kind-hearted. He maintains a sober lifestyle. He is liked by neighbours who urged the mother not to report the rapes to the police, believing that it should rather be resolved as a family matter. The mother quite rightly did not follow this advice.

[15] The appellant acknowledged having a sexual problem. He said that the two rapes in the present case occurred on the spur of the moment. He has a strong sexual drive. He told the magistrate that he would like to get help from the State. Under cross-examination he was given ample opportunity to admit that his problem was more specifically the inappropriate urge to molest children but he was not prepared to concede this. He admitted that he had not sought help for his sexual problems in prison or subsequent to his release.

[16] The appellant testified that he had found prison life particularly hard after having lost all sight. Unlike other inmates, he could not pass the time by reading

books or watching television. He needed assistance getting food and making telephone calls. He was often robbed.

[17] The appellant, who was not granted bail, spent about a year awaiting trial and sentence.

[18] I turn now to consider whether the magistrate was right to conclude that there were no substantial and compelling circumstances to depart from the prescribed life sentences. I had occasion in *S v GK* 2013 (2) SACR 505 (WCC) to consider the test for interfering with a lower court's determination on the absence of substantial and compelling circumstances (paras 4-7), concluding that the appellate court is entitled to make its own value judgment on this question. I also reviewed the leading cases on the application of the minimum sentencing legislation in relation to rape (paras 8-14). In what follows I substantially repeat the latter paragraphs.

[19] I naturally accept that the rape of a child under the age of 16 is a heinous and abhorrent crime, which is why the lawmaker has placed this type of rape in the category of crimes attracting a life sentence in the absence of substantial and compelling circumstances. However, the decisions of our courts, including the Supreme Court of Appeal, reflect that not infrequently perpetrators of this type of rape are *not* sentenced to life imprisonment because substantial and compelling circumstances are found to be present. If one examines the minutiae of leading cases it may be difficult to discern why in some of them life sentences were upheld where in others, not apparently less heinous, substantial and compelling circumstances were found to exist. In *S v PB* 2013 (2) SACR 533 (SCA) Bosielo JA stated that findings in prior cases cannot be elevated to the status of binding precedents or benchmarks or be allowed to become a straitjacket (paras 16-19). One must thus distinguish between the legal principles to be deduced from authoritative judgments and the detailed application of those principles to the facts of particular cases. It is the legal principles with which lower courts should mainly concern themselves.

[20] In terms of *S v Malgas* 2001 (1) SACR 469 (SCA) the factors which are to be considered in determining whether substantial and compelling circumstances exist

are all the factors traditionally taken into account in assessing an appropriate sentence, bearing in mind, however, that it is no longer 'business as usual' and that the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions. If, after considering all the relevant factors, the court has not merely a sense of unease but a conviction that injustice will be done if the prescribed sentence is imposed or (to put it differently) that the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society, there will be substantial and compelling circumstances requiring the court to depart from the prescribed sentence and to impose a lesser sentence.

[21] The statement in *Malgas* that no factors conventionally relevant to sentencing are excluded from consideration must now be qualified because of the insertion into s 51(3) of the Act of para (aA). This occurred when s 51 was substituted in terms of s 1 of Act 58 of 2007. Paragraph (aA) sets out certain circumstances which, in the case of rape, shall *not* constitute substantial and compelling circumstances. The exclusionary effect of this paragraph has been held to convey that any such circumstance on its own will not amount to substantial and compelling circumstances but that such factors may be taken into account together with others in reaching a conclusion that there are substantial and compelling circumstances: see *S v Nkawu* 2009 (2) SACR 402 (ECG) para 15. This view was approved by the Supreme Court of Appeal in *S v SMM* 2013 (2) SACR 292 (SCA) para 26.

[22] In *S v Abrahams* 2002 (1) SACR 116 (SCA) Cameron JA, after observing that the rape in that case was 'not one of the worst cases of rape', said that '[s]ome rapes are worse than others' and that 'the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate or unjust' (para 29). A similar sentiment was expressed in *S v Mahomotsa* 2002 (2) SACR 435 (SCA) paras 17-19).

[23] This view was further developed by Nugent JA in *S v Vilikazi* 2009 (1) SACR 552 (SCA), where he remarked upon the fact that there was no gradation in the Act from the category of rapes by first offenders which attracted a sentence of 10 years in terms of s 51(2)(b)(i) read with Part 3 of Schedule 2 and those which attracted a life sentence in terms of s51(1) read with Part 1. A single circumstance may shift the

offence from the one category to the other (para 13). It is only by approaching sentencing under the Act in accordance with *Malgas* that it is possible to avoid incongruous and disproportionate sentences (para 14). This means that it is the sentencing court's duty to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is proportionate to the particular offence (para 15). *Malgas* rejected the view that the prescribed sentence could be departed from only if the circumstances were 'exceptional'. It is wrong, said Nugent JA, for the sentencing court to assume *a priori* that a life sentence is proportionate for a crime falling into a particular category. Indeed, when the matter is correctly approached it might turn out that the prescribed life sentence is seldom imposed in cases that fall into a specified category. If that occurs 'it will be because the prescribed sentence is seldom proportionate to the offence' (paras 16-18). Nugent JA also said that if (as is the case) the presence of only one of the prescribed circumstances may place a rape in Part 1 rather than Part 3 (for example, because the rape victim was 15 rather than 16), the absence of any of the other prescribed circumstances is capable of lessening the culpability of the offender (para 54). This does not mean that life sentences are only to be imposed when all the prescribed aggravating circumstances are present. There comes a point when a life sentence is proportionate to the offence, even though a greater horror can be imagined (para 54).

[24] In *SMM* supra Majiedt JA reviewed the Supreme Court of Appeal's decisions on rape sentencing. Majiedt JA, while recognising that the country was facing a 'crisis of epidemic proportions in respect of rape, particularly of young children' (para 14) and while emphasising that rape is by its nature a 'degrading, humiliating and brutal invasion of a person's most intimate, private space' even when unaccompanied by violent assault (para 17), repeated the injunction contained in earlier case law that one should not approach punishment 'in a spirit of anger' and that sentencing must be assessed 'dispassionately, objectively and upon a careful consideration of all relevant factors' (para 13). While the public is rightly outraged by the scourge of rape and while there is increasing pressure on the courts to impose harsher sentences, one cannot sentence only to satisfy public demand for revenge – other sentencing objectives, including rehabilitation, cannot be discarded altogether in order to attain a balanced, effective sentence (para 14). The learned judge of

appeal approved the recognition in cases such as *Abrahams* and *Vilikazi* that there are categories of severity of rape (para 18).

[25] While I do not think it is helpful for present purposes to analyse the detailed application of general principles to the facts of specific leading cases, I note that in *Mudau* the Supreme Court of Appeal was called upon to assess the appropriateness of a life sentence imposed on the appellant for the rape of a child. The appellant, who was 47 at the time of sentencing, raped his 13-year old niece. He first penetrated her vagina with two fingers and shortly thereafter penetrated her vagina with his penis in an episode lasting about five minutes. Semen was subsequently found on the child's underwear. He gave her R5,00 to buy her silence. He denied the rape and apparently expressed no remorse. There was the aggravating feature of an abuse of trust in a family setting. As against this, the rape itself occasioned no serious injury to the victim and there was no additional violence. There was no victim impact report so the psychological trauma could not be assessed. Having weighed the mitigating and aggravating features, the court held that the trial court's imposition of a life sentence was 'grossly disproportionate to the offence'. The life sentence was set aside and replaced with one of 15 years' imprisonment. See also *S v EN* 2014 (1) SACR 198 where the appellant, a 46-year-old first offender, had raped his 15-year-old stepdaughter. The complainant suffered no serious physical injuries and had submitted to intercourse without threats of violence but after having accepted gifts and money. The appellant had been drinking. The court held that life imprisonment was disproportionate to the crime and substituted a sentence of 15 years' imprisonment. In *GK* itself this court (Mathee AJ dissenting) set aside a sentence of life imprisonment for the oral rape of a seven-year-old girl and substituted a sentence of 17 years' imprisonment.

[26] The court thus must not approach the present appeal with a mind that a life sentence is *a priori* a just punishment for the appellant. Instead, I must examine all the circumstances of the case and then ask myself whether I am not merely uneasy at the imposition of a life sentence but have a conviction that such a sentence would be unjust, ie disproportionate to the crime, the offence, and the legitimate needs of the community. Inevitably that entails forming a view as to what a just sentence would be in all the circumstances of the case, bearing in mind however that even

discretionary sentences for crimes dealt with in the Act (ie once substantial and compelling circumstances have been found to be present) can be expected to be more severe than before. In this regard Cameron JA stated in *Abrahams supra* that the Act 'creates a legislative standard that weighs upon the exercise of the sentencing court's discretion' (para 25). If the just sentence, approached in this manner, falls materially below the prescribed sentence there will be substantial and compelling circumstances to depart from the prescribed sentence. As was held in *Malgas* (para 23), substantial and compelling circumstances are not confined to circumstances where the prescribed sentence would, in relation to the sentence the court would have imposed, be 'disturbingly' inappropriate or 'induce a sense of shock'. In other words, a discrepancy falling short of the latter test (which applies when an appellate court considers whether it may interfere with a trial court's discretionary sentence) may justify a finding that substantial and compelling circumstances exist to depart from the sentence prescribed by the Act.

[27] I consider first the life sentence for X's rape. The rape cannot be considered as falling at the most heinous end of the scale of child rape. The form of the rape was such that the child suffered no physical injuries. There was no evidence that the appellant ejaculated in the child's mouth.[1] Because of the boy's tender age, he mercifully did not understand what was happening to him and thus did not experience the horror and disgust that an older child might have felt. No ill-effects were observed in the boy's subsequent behaviour. He seemed to be as happy and playful as before. This is not to say that psychological harm will not manifest itself later. However, he has received counselling and the incident may well leave him largely unscathed.

[28] The appellant's two prior convictions for indecently assaulting children are undoubtedly an aggravating circumstance. He raped X shortly after the expiry of his 10-year sentence. His apparent inability to acknowledge that his inappropriate sexual desires are specifically directed at children is a further cause of concern. However, the appellant realises that in general he has a sexual problem and wishes

[1] In the victim impact report the social worker stated that the child had told her that the appellant 'had pee in his mouth'. The social worker was not called to testify to explain what the child meant by this. The appellant's s 112(2) did not include an admission of ejaculation.

to receive help for it. Part of the process of treatment would involve bringing him to a realisation of the true nature of his problem. The appellant pleaded guilty and expressed what I regard as genuine shame and remorse for what he had done. His blindness must inevitably limit his opportunities for sexual predation.

[29] I do not think one can reject as untrue the appellant's evidence that he himself was abused as a child. He also grew up with a visual disability which in his perception hampered his schooling and led to his being bullied. These circumstances, coupled with the absence of a father figure in the home, are likely to have played their part in producing an adult exhibiting deviant sexual behaviour.

[30] The prison system, which the appellant first encountered following his previous convictions, seems to have failed him badly. Part of the object of imprisonment is rehabilitation. Instead the appellant, already suffering a partial visual disability, was terrorised and assaulted by a fellow prisoner, as a result of which he became completely blind. He feels that he did not receive sufficiently prompt medical attention. When asked why he did not seek psychological help for his sexual problem while in prison, he said that he was absorbed in coping with blindness. I can readily accept this. There is no doubt that, for the appellant as a 42-year-old blind man, prison will be a far more lonely, dismal and vulnerable place than for a sighted person. Prior to sentencing he had to endure incarceration for about a year.

[31] These circumstances leave me in no doubt that life imprisonment for X's rape is an unjust sentence, ie one which is disproportionate to the crime, the offence and the legitimate needs of the community. Unfortunately for the appellant, the gravity of the crime and his previous convictions do not allow him to escape a significant period of imprisonment. I thus reject Mr Fourie's submission that s 276(1)(i) is an appropriate sentencing option, a submission which he did not press in oral argument. In my view, a significant period of direct imprisonment is required. Part of the sentence, should, however be suspended to provide a strong inducement to the appellant to refrain from similar wrongdoing in the future. All things considered, I regard as just a sentence of 15 years' imprisonment, of which five years should be suspended on appropriate conditions. I sincerely hope that during the appellant's

incarceration he will receive psychological assistance with his sexual problem. If and when he is released on parole, the relevant authorities will no doubt give consideration to conditions aimed at minimising the risk of his coming into contact with children on an unsupervised basis.

[32] I turn now to consider the life sentence in respect of Y's rape. The s 112(2) statement which the State accepted said no more concerning the incident than that the appellant inserted his finger into her vagina while she was standing in front of him. According to the child's description to the social worker in the victim impact report, the appellant 'touched her vagina and then she ran away'. There is nothing to show that it was anything more than a fleeting incident. He did not undress her.

[33] As against this, Y as an eight-year-old girl would have had a greater sense of the invasion of her body. The incident, though brief, has had a material impact on her emotional state. She, too, has received and will in the future receive counselling.

[34] I have already mentioned the other circumstances relevant to sentencing in dealing with X's case. The aggravating effect of the previous convictions is perhaps greater in Y's case because the earlier indecent assaults were also instances of vaginal penetration with the finger.

[35] I am, once again, convinced that a life sentence for Y's rape is unjust. An appropriate sentence would be 12 years' imprisonment, of which three years should be suspended on appropriate conditions.

[36] The remaining question is whether the unsuspended periods of imprisonment or any part thereof should run concurrently. In my opinion, an effective period of imprisonment of 19 years would be too crushing a punishment (cf *S v Muller & Another* 2012 (2) SACR 545 (SCA) paras 9-13). Taking into account in particular the harsh effects which blindness will have on the appellant's prison life and the period he spent in prison awaiting trial, I consider that an effective period of 13 years' imprisonment strikes the right balance.

[37] The following order is therefore made: The appeal against the sentences imposed by the trial court on 16 October 2014 succeeds. The said sentences are set aside and replaced with sentences as follows, antedated to 16 October 2014:

(a) On count 1 the appellant is sentenced to 15 years' imprisonment, of which five years are suspended on condition that the appellant is not convicted of any crime in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 committed during the period of suspension.

(b) On count 2 the appellant is sentenced to 12 years' imprisonment, of which three years are suspended on condition that the appellant is not convicted of any crime in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 committed during the period of suspension.

(c) Six of the nine years' unsuspended imprisonment imposed in respect of count 2 shall run concurrently with the 10 years' unsuspended imprisonment imposed in respect of count 1, so that the effective period of unsuspended imprisonment in respect of both counts shall be 13 years.

_____

VELDHUIZEN J

_____

ROGERS J

APPEARANCES

For Appellant Adv GW Fourie

For Respondent	Ms N Ajam Office of the Director of Public Prosecutions Western Cape